

(1984) 10 AP CK 0020

In the Andhra Pradesh High Court

Case No : Writ Petition No. 6696 of 1980

Mysore Structurals Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

Date of Decision : 26-10-1984

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 4, 4(1)
Constitution of India, 1950 — Article 133

Citation : (1985) 4 ECC 165 : (1985) 5 ECR 216 : (1985) 19 ELT 60

Hon'ble Judges : Sardar Ali Khan, J; B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : P. Venkatarama Reddy, for the Appellant; K. Jagannadha Rao, for the Respondent

Final Decision : Allowed

Judgement

B.P. Jeevan Reddy, J.—The question in this writ petition is, whether the petitioner who manufactures sleepers and supplies them, exclusively to the South Central Railway, was right in not including the value of malleable cast iron (MCI) inserts in the value of the sleepers supplied by it to the Railways ? The relevant facts are the following :

2. A contract was entered into between the Railways and the petitioner on 19-7-1973-which has been extended from time to time-whereunder the petitioner has undertaken to manufacture and supply sleepers. The contract stipulates that the Railways shall supply MCI inserts, free, to the petitioner, which have to be inserted into the sleepers, at the time of their manufacture". These inserts are meant to hold the rails which are laid over the sleepers. The contract further stipulates that the petitioner shall account for all the MCI inserts supplied to him. It would be appropriate to notice the relevant clauses in the contract. Sub-clauses (1) and (2) of clause 2 of the contract reads as follows :

"3.1 The above rate per sleeper shall be inclusive of all labour and material (excepting malleable cast iron inserts and fastenings which will be supplied free

For Works Station near Secunderabad by the Purchaser) and also inclusive of all taxes and duties leviable as on 19-7-1973 by Central/State Governments and/or local bodies on raw material but exclusive of Central/State Sales Tax legally payable on the finished sleepers which only will be to purchaser's account. Any variation in the taxes or duties levied thereafter, i.e., after 19-7-1973 will be to purchaser's account. The purchaser will not, however, be responsible for the payment of Sales Tax or any other taxes or duties made by the Contractor under misapprehension of law.

3.2 The malleable inserts shall be supplied free of cost to the Contractor in instalments as may be determined by the purchaser, on the contractor's procuring the requisite raw material for the purpose."

Clause 17 of the contract reads as follows :

"17.1. An allowance of 2% wastage shall be made in account of M.C.I. Inserts to be supplied by the Railways in terms of Clause 3.1 above and 2.2 of standard conditions of contract at Annexure "A" ".

From a reading of the above clauses, it is evident that there is no sale or gift of the M.C.I, inserts by the Railways to the petitioner. They are only supplied to it, so that, it can insert them-which insertion is to be done only at the time, the concrete is poured into the moulds. In case, the petitioner does not manufacture sleepers or fails to supply the sleepers, it has to account for and return the inserts to the Railways. The rate per piece, agreed between the parties, as per clause 3, does not include the value of the inserts supplied by the Railways.

3. In the invoice prepared by the petitioner, only the amount mentioned in Clause 3 of the contract is shown, which means, that the value of the inserts, is not included in the invoice value. This procedure was accepted by the Central Excise Authorities, for some time, but, thereafter, they changed their stand, evidenced by their show cause notice dated 10-4-1980. By this show cause notice, the authority called upon the petitioner to show cause why it should not be made liable for paying the excise duty on the difference between the value as shown in the invoice and the value of sale price inclusive of the value of inserts, for the period 18-6-67 to 15-1-1980. The petitioner submitted its objections. The Assistant Collector, Central Excise, Hyderabad, who is the adjudicating authority, overruled the petitioner's contention and held it liable for the duty on the said difference. The petitioner carried the matter in appeal to the Appellate Collector who, by his Order dated 19-9-1980, set aside that part of the demand which related to the period prior to six months of the issuance of the show cause notice. But, so far as the period within six months is concerned, he remitted the matter for fresh disposal, to the Assistant Collector, according to law. The Appellate Collector, however, did not go into the merits of the controversy, i.e., whether the petitioner is and was bound to include the value of inserts, in the invoice prepared by him and his liability to pay duty on that amount, as well. The petitioner says that inasmuch as the authorities were demanding that the

petitioner should include the value of the inserts, in his invoice value and pay duty thereon, he had to approach this Court by way of this writ petition. He also obtained stay of all further proceedings, as a result whereof, the Assistant Collector could not pass final orders in pursuance of orders of the remand aforesaid.

4. Sri P. Venkatarama Reddy, learned Counsel for the petitioner relies upon Section 4(1)(a) of the Central Excises and Salt Act, 1984 (1 of 1944) and contends that the price mentioned in the invoice is the normal price of the goods, because that is the price at which it, ordinarily, sells the same to the Railways. He submits that the Railways is not a related person within the meaning of Section 4(1)(a) of the Act and further that in this case, the price is the sole consideration for sale. He submits, further, that the transaction between it and the Railways, in this case, represents wholesale trade, within the meaning of Section 4(1)(a) of the Act. The Counsel also relies upon the notification No. 120/75 dated 30-4-1975, in support of his contention.

5. The question arising herein, has to be answered keeping in view, the provisions of Section 4 of the Act, as also the terms of the contract, between the parties. The following facts are relevant, in this behalf :

6. The sleepers manufactured by the petitioner are sold exclusively to the Railways. There is no other buyer and there is no wholesale trade, as such, in the sleepers manufactured by the petitioner. The inserts which are supplied by the Railways to the petitioner, are neither sold, nor gifted to the petr., with the result, they do not become the property of the petitioner. If the petitioner has not become the owner of the inserts, obviously, it cannot sell them either to the Railways or to any one else. As stated above, it has to account to the Railways for all the inserts supplied to it. Indeed, the inserts are supplied to the petitioner, only with a view to enable the petr. to insert them into the sleepers at the time of manufacturing of sleepers, that is, at the time when concrete is poured into the moulds. These inserts cannot be fixed to the sleepers, after the sleepers are manufactured. To give them proper hold, the inserts must be placed into the moulds while pouring the concrete. The contract clearly provides the rate at which the sleepers are to be supplied at Rs. 110.81 ps. or whatever is price mentioned in Clause 3.1 at a given point of time. What is relevant is that the rate so mentioned, does not include the value of the inserts, for the obvious reason that the inserts, never become the property of the manufacturer of the sleepers. Therefore, the petitioner cannot include their value in the sale bill or invoice, as it may be called. It should also be remembered that the buyer, i.e., Railways, is not a "related person", as defined in Section 4(1)(a) of the Act and there is no other consideration for the sale, except the price agreed between the parties. For all these circumstances, we are of the opinion that the petitioner was right in contending that the amount mentioned by it in the invoice, is the normal price of the sleepers supplied by it to the Railways, for the purpose of levy of duty under Sections 3 and 4 of the Act.

7. We may, in this connection, refer to a Bench Decision of the Calcutta High Court in *Union of India and Ors. v. Free India Dry Accumulators Limited*--1983 E.L.T. 733 , relied upon by the learned Standing Counsel for the Central Government. In that case, *M/s. Free India Dry Accumulators Ltd.*, respondent in the writ appeal, had entered into a contract with the Railways for supply of certain quantities of electric storage batteries. The batteries were to be manufactured with old containers to be supplied by the Railways, the value of which was agreed to be adjusted against the price of the finished batteries. The price of each finished battery was fixed at Rs. 309.50 ps. but, as the Railways was supplying containers, it was agreed that a rebate of Rs. 50/-, was to be deducted from the said price. By a subsequent contract, the Railways also agreed to supply lead acid, for which, a further rebate of Rs. 30/-, was to be given in the price of each finished battery. Thus, a total of Rs. 80/- was agreed to be deducted from the price of the battery, namely, Rs. 309.50 ps. The question arose, whether for the purpose of levy of excise duty, the value of battery is Rs. 309.50 ps. or Rs. 229.50 ps. (i.e. Rs. 309.50 ps. minus Rs. 80/-). It was held by a division Bench of the Calcutta High Court overruling the view of the learned single Judge that the value is Rs. 309.50 ps., and not the other figure. It was observed by the Division Bench :

"The respondent was to manufacture the batteries for the Railway. It was not the contract that the respondent was to supply the parts of the batteries. Indeed, the price for each battery including the cost of the container and lead acid was fixed. The value of the container and lead acid was also agreed between the parties. It was agreed that the Railway was to supply the containers and lead acid. It was further agreed that the value of the containers and lead acid would be adjusted against the price of the finished product in the form of rebate. It is true that the Railway supplied the containers and lead acid, but not gratis. If the respondent had to purchase the same from the market, it had to incur the same cost as agreed to between the parties. Instead of procuring such containers and lead acid from the market, the respondent got the same from the Railway and had to pay the price of the same which was adjusted as rebate. It is difficult to accept the contention made on behalf of the respondent that the respondent had not to incur any cost with regard to the container and lead acid that were supplied by the Railway. Indeed, the respondent had to adjust the price of the container and lead acid against the price of the finished product. In our opinion, the manufacturing cost of a finished storage battery cannot be conceived of without taking into consideration the cost of the containers and lead acid. As has been already stated, the respondent was not, under the contract, to supply parts of the batteries, but was to supply the finished batteries. Such batteries must include also the cost of the container and lead acid and that cost had to be incurred by the respondent when it granted rebate of Rs. 80/- from the total price. In the circumstances, therefore, the Government of India, was quite justified in setting aside the orders of the Appellate Collector and in affirming that of the Assistant Collector of Central Excise directing payment of excise duty

on the sum of Rs. 80/- for each battery supplied by the respondent."

It is relevant to notice the important difference between the contract there and the contract with which we are concerned herein. According to the contract in that case, there was sale of containers and the lead acid by the Railways to the manufacturer. The value of the containers and lead acid was also agreed upon. The sale amount included the total value of the battery, from which a rebate was provided representing the value of the container and lead acid. As a fact also, the bill made out by the manufacturer showed the entire value of the battery and then gave rebate for the value of the containers and lead acid. It is in those circumstances that the said decision was rendered. But, as we have pointed out, in the case before us, the inserts never become the property of the petitioner. They are merely supplied to it, enabling it to insert them into the sleepers at the time of their manufacture, all of which sleepers are to be supplied, exclusively to the Railways. In case of its failure to manufacture or failure to supply the sleepers, the petitioner has to return those inserts to the Railways. As we have stated earlier, the petitioner cannot sell what does not belong to it or what has never become its property. The ownership of the inserts always remained with the Railways. Having regard to the fact that the Railways cannot be said to be a related person and also because, in this case, the price is the sole consideration for sale, we are of the opinion that the value mentioned in the invoice is the normal price of the sleepers supplied by the petitioner to the Railways for the purpose of levy of excise duty. The writ petition, accordingly, is allowed. There will be no order as to costs.

8. The learned Standing Counsel for the Central Government makes an oral request for leave to appeal to the Supreme Court under Article 133 of the Constitution of India. We, however, do not think that this case involves any substantial question of general importance which, in our opinion, needs to be decided by the Supreme Court. Oral request is, accordingly, rejected.